



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JANUARY 31, 2023

IN THE MATTER OF:

Appeal Board No. 625764

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were no appearances. By default decision filed August 4, 2022 (122-04914), the Administrative Law Judge sustained the initial determination.

The employer applied to reopen the decision of the Administrative Law Judge filed August 4, 2022.

Upon due notice to all parties, a hearing was held at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance on behalf of the employer. By decision filed September 19, 2022 (), the Administrative Law Judge denied the employer's application to reopen 122-04914 and continued in effect the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked for the employer, a non-profit organization, as a customer service representative for three years until November 19, 2021. The claimant worked full-time, Monday through Friday, 8 am to 4 pm. The claimant's daughter attended a day care that was subsidized by the county. Prior to the end of her employment, the claimant had renewed her application for Paid Family Leave, (PFL). She was aware that she was only allowed to submit PFL claim forms for full-day absences from work due to her child's illness. The claimant was further aware from her application for PFL and from the employer's code of conduct, that it was unlawful to make false statements or submit a false claim.

On the morning of November 8, 2021, the claimant sent her manager a text message indicating that she might be a few minutes late to work because a pedestrian had been hit by a car and there was an attempt to resuscitate the pedestrian. Later, the claimant sent another text message which stated that she had lied, that the day care would not let her daughter stay because they had not received payment from the county, and that she probably would not be in because she was leaving at 10:45 am anyway. On the morning of November 9, 2021, the claimant texted her manager again because her daughter was still unable to attend day care.

On November 15, 2021, the claimant completed and submitted PFL claim forms to human resources for signature for November 8 and 9, 2021, prior to the forms being sent to the insurance company. Upon receipt of the forms, the human resource manager notified the claimant that she was utilizing PFL for non-PFL reasons which was not authorized. The claimant replied that although she could not leave her child at day care on November 8, 2021 for payment issues, her daughter began running a fever on the afternoon of November 8, 2021. The human resource manager told the claimant that she would sign the claim forms noting on the November 8, 2021 claim form that the claimant's absence on November 8, 2021 was for non-PFL reasons. The human resource manager further advised the claimant that it was her responsibility to oversee and monitor company benefits, to see that they were used for the intended purpose, that they were fairly applied within the parameters of the policy and law, and that the misuse of the benefits could lead to a civil penalty.

On November 18, 2021, the claimant's PFL claim for November 8, 2021 was denied, citing that the claimant's absence was not due to illness of her

child. The employer discharged the claimant for submitting a fraudulent PFL claim in violation of the employer's code of conduct and the law.

The employer received a Notice of Hearing dated July 21, 2022 notifying it of a hearing to be held on August 4, 2022. Included on the notice were instructions directing the employer to produce witness(es) with first-hand knowledge of the incident causing the claimant's employment to end along with the individual who made the decision to discharge the claimant. The employer's representative identified two first-hand witnesses for the employer: the claimant's immediate manager who texted with the claimant on the morning of November 8, 2021, and the human resource manager who handled the claimant's PFL claims and discharged the claimant. The employer's representative decided not to appear at the hearing because the claimant's manager was away on a prescheduled family vacation and unable to testify.

OPINION: The credible evidence establishes that the employer failed to appear at the hearing scheduled for August 4, 2022 because one of the employer's first-hand witnesses was away on a preschedule family vacation and unavailable for the hearing. Since the employer was directed to produce first-hand witnesses to the events causing the claimant's employment to end and the witness who discharged the claimant, we find

that the employer had good cause to not appear at the hearing. Accordingly, the employer's application to

reopen is granted.

The credible evidence further establishes that the claimant was discharged for submitting a false PFL claim in violation of the employer's code of conduct policy. The claimant was admittedly absent on November 8, 2021 for monetary reasons in connection with county assistance for her day care provider, not due to the illness of her daughter. It is significant that when the human resource manager notified the claimant that she was using paid family leave for non-PFL reasons, the claimant responded that her daughter began running a fever on the afternoon of November 8. While the record contains a document dated approximately six months after the incident from someone who allegedly was supposed to babysit the claimant's daughter on November 8, 2021, indicating that the claimant's daughter had a fever that day, the note is not authenticated, does not provide a time reference, and does not appear to be from a physician. In light of the claimant's inconsistent versions to the

employer of her reason of her anticipated lateness and then her absence on November 8, 2021, and her reply to the human resource manager that her daughter's fever began in the afternoon of November 8, we do not find the unauthenticated note from an unknown individual to be credible. Therefore, we find that her absence from work beginning at 8 am on November 8 was not due to her daughter's illness, but due to a monetary issue with the county's assistance. Despite this being the cause of the claimant's absence on that day, the claimant submitted a PFL claim form for November 8, 2021 to the human resource manager for approval. We find it significant that upon receipt of the claim form, the human resource manager notified the claimant she was utilizing PFL for non-PFL reasons which was not authorized. Despite notification, the claimant submitted the false PFL claim form for payment of wages for November 8, 2021. The Court and the Appeal Board have held that falsification of time records must be deliberate to constitute misconduct where there is no prior warning (See, Matter of Arcila, 6 AD3d 921 [3d Dept 2004] and Appeal Board Nos. 590688, 587659, 587631 and 590529). Here, the claimant deliberately submitted the false PFL claim form. Accordingly, we conclude that the claimant's actions rise to the level of misconduct.

DECISION: The decision of the Administrative Law Judge is reversed.

The employer's application to reopen 122-04914 is granted.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future, is sustained, effective November 20, 2021.

The initial determination, holding the claimant eligible to receive benefits, is overruled.

The claimant is disqualified from receiving benefits, effective November 20, 2021, until the claimant has subsequently worked in employment and earned remuneration at least equal to 10 times the claimant's weekly benefit rate. Employment and earnings from non-covered, excluded or self-employment will not count.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER